

Annual Survey of Massachusetts Law

Volume 1959

Article 8

1-1-1959

Chapter 4: Contracts

J. Edward Collins

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/asml>



Part of the [Contracts Commons](#)

Recommended Citation

Collins, J. Edward (1959) "Chapter 4: Contracts," *Annual Survey of Massachusetts Law*: Vol. 1959, Article 8.

C H A P T E R 4

Contracts

J. EDWARD COLLINS

§4.1. **Impossibility of performance: Subcontractor's preliminary work.** The status of a subcontractor whose contract has become impossible of performance because of the abandonment of the construction project covered by the prime contract has been a matter to which the attention of the Supreme Judicial Court has been directed with some frequency in recent years, following the judicial determination of the invalidity of a general contract for the building of a chronic disease hospital in Boston.¹ In the first case of a trilogy, *M. Ahern Co. v. John Bowen Co.*,² a subcontractor who was forced to discontinue performance under the contract when the project was stopped was held to have no enforceable contract rights against the prime contractor, although he was entitled to quasi-contractual recovery for the value of the services, labor and materials furnished up to the time of the project's abandonment. The fact that the partial performance of the subcontractor had no value to the general contractor under the circumstances, and that any payment that the latter might be required to make would constitute an uncompensable loss to him, constituted no bar to the quasi-contractual recovery. In the second case, *Boston Plate & Window Glass Co. v. John Bowen Co.*,³ recovery under a subcontract was sought for work done and expenses incurred in preparation for performance, the project having been stopped prior to the commencement of any actual performance. Recovery was denied, the Court leaving open the question whether quasi-contractual relief might be had in this situation.

During the 1959 SURVEY year, the final case of the trilogy, *Albre Marble and Tile Co. v. John Bowen Co.*,⁴ came before the Court.

J. EDWARD COLLINS is Associate Professor of Law at Boston College Law School and faculty adviser of the Boston College Commercial and Industrial Law Review. He is a member of the American Law Institute. He is a former president of the Bar Association of Hawaii and former acting dean of the Catholic University Law School.

§4.1. ¹ Gifford v. Commissioner of Public Health, 328 Mass. 608, 105 N.E.2d 476 (1952).

² 334 Mass. 36, 133 N.E.2d 484 (1956), discussed in 1956 Ann. Surv. Mass. Law §4.1.

³ 335 Mass. 697, 141 N.E.2d 715 (1957), discussed in 1957 Ann. Surv. Mass. Law §14.2.

⁴ 338 Mass. 394, 155 N.E.2d 437 (1959).

Here the subcontractor sought to recover both contractually and quasi-contractually for expenditures incurred in the preparation of shop drawings, samples, affidavits and other work preliminary to the furnishing of tile and marble material, services and labor in the construction of the hospital. The invalidity of the prime contract had been adjudicated prior to the subcontractor's being called upon to install the tile and marble work.

The case was disposed of in the trial court by order for judgment on the pleadings and affidavits submitted. The contractor's affidavit set up the facts and circumstances leading to the judicial declaration of invalidity of the prime contract. The subcontractor submitted a counteraffidavit seeking to avoid the defense of impossibility by claiming that the contractor's wrongful acts caused the invalidity of the prime contract. The counteraffidavit was technically deficient and the order for judgment for the defendant on the contract counts was upheld by the Court.

On the quasi-contract counts the defendant contended that the subcontractor's expenses were all incurred in preparation for performance and not in actual performance of the contract, and when contractual performance becomes impossible only the value of labor and materials "wrought into" the structure is compensable.⁵ The plaintiff, on the other hand, claimed that under a contract clause he was required to submit the samples, shop drawings, tests and affidavits as they were ordered or specified by the contractor and they were prepared under the contractor's supervision.

The Court in agreeing that the subcontractor was entitled to relief avoided approving any principle that would permit recovery for payments made or obligations incurred in preparation for performance when contract performance has been rendered impossible through no fault of either party. Rather it based its decision upon a combination of three factors peculiar to this case. (1) The defendant's conduct, while not sufficiently culpable to create liability for breach of contract, was a factor in creating the impossibility. (2) The subcontractor's preparatory expenses were not within his control but were required to be undertaken by the terms of the contract itself, when ordered or specified by the prime contractor. (3) The acts requested and performed were incapable of being "wrought into" the structure.

With the result of the case there can be no serious disagreement. The combination of factors pointed out by the Court certainly justifies its conclusion. The case is disappointing, however, since it fails to give much needed clarification to the Massachusetts law of quasi-

⁵ *Young v. Chicopee*, 186 Mass. 518, 72 N.E. 63 (1904), involved a contract to repair a municipal bridge, the contractor to be paid on a unit basis for each thousand feet of lumber wrought into the bridge. Upon destruction of the bridge by fire before the job was completed, the contractor was permitted to recover only for the lumber "wrought into" it and not for the unused lumber stacked on the bridge and its approaches. Title to the unused lumber was in the contractor and it was his loss, whereas that "wrought into" the bridge became the property of the town for which it was liable to pay.

contracts. The so-called "wrought into" principle, as enunciated in *Young v. Chicopee*,⁶ denies recovery for work done pursuant to a contract rendered impossible of performance by the destruction, without fault of either party, of the structure into which the work is designed to be incorporated, prior to the incorporation of the work into the structure. The principle is of doubtful validity and it is unfortunate that the Court saw fit to distinguish the *Young* case rather than repudiate the principle or narrowly limit its applicability to property loss situations.⁷

The case is likewise disappointing in that it contains no suggestion as to whether either of the two other factors considered by the Court, i.e., the culpability of the contractor or the contractual obligation of the subcontractor to undertake the preparatory work under the supervision of the contractor, would standing alone constitute a sufficient basis for the granting of quasi-contractual relief.

In the *Ahern* case the Court clearly pointed out that, since the contractor's conduct played a significant part in causing the situation that resulted in the impossibility of the subcontractor's completely performing, the contractor should pay the contract price.⁸ Since the *Albre* case involved work normally characterized as preparatory to contract performance, but which was actually required by specific contract language to be undertaken when requested by the contractor and so was under his supervision, it could be urged that *Albre* does not go beyond *Ahern* but is actually another partial performance case for which contractual relief should have been available. On the other hand it remains to be seen whether the *Albre* case would be followed in a situation in which the contractor was instrumental in causing the impossibility, and the work done by the subcontractor was purely preparatory and not specifically required by the contract although nevertheless essential to the subcontractor's contemplated performance. It certainly could be contended that the expense incurred should properly have been a cost item in the subcontractor's bid for the job, and that he had reasonably expected to be paid for it out of the contract price. It would appear that payment for such expenses would be legally justifiable under such circumstances on a

⁶ 186 Mass. 518, 72 N.E. 63 (1904), discussed in note 5 *supra*.

⁷ A more appropriate test would be whether the preparatory work was necessary for the performance specified under the contract and was a cost item reasonably to be included as a factor in the make-up of the contract price. The Comment to 2 Restatement of Contracts §468(3) states that, when there is fault on neither side, loss due to impossibility must lie where it falls except that the recipient of the benefit of performance must pay to the "extent that what he has received forwards the object of the contract." Section 333 would permit recovery of compensatory damages in breach of contract actions for expenditures in necessary preparation for performance when they can be fairly regarded as a part of the cost of performance in estimating profit and loss. The subcontractor's expenditures in the *Albre* case were of this type.

⁸ Section 468 of the Restatement of Contracts gives a right of restitution to a party who has rendered part performance under a contract, full performance having become impossible. See also §333, discussed in note 7.

quasi-contractual basis. It is unfortunate that the Court makes no intimation to that effect.

§4.2. Architect's approval: Power to decide. It has become customary in construction contracts to provide that the architect or engineer shall have power to direct the construction work and resolve questions that may arise in the course of it. Contract stipulations to that effect have been approved by the courts although cases have not been infrequent in which parties have challenged the powers of the architect thereunder or the propriety of his decisions. Two such cases arose during the 1959 SURVEY year.

In *G. L. Rugo & Sons, Inc. v. Town of Lexington*¹ the question was presented as to the remedies that might be available to a contractor when the architect decides that certain work is required by the specifications, which work the contractor claims to be an "extra" for which he should be paid. The contract provided that the architect should "decide all questions which may arise as to the interpretation of the plans and specifications and as to the fulfillment of the contract on the part of the contractor, and his determination shall be final and conclusive."² When the question arose, the architect determined that strapping of the ceilings of some rooms was required under the contract. The contractor made the installation but, believing the determination to have been erroneous, submitted the question to arbitration under another contract clause that provided for arbitration of arbitrable issues. A majority of the arbitration panel agreed with the contractor that the installation was an extra, but denied his claim for payment on the ground that the architect's decision was final under the contract. The Court agreed with this determination, holding that under the contract the arbitrators were empowered only to determine whether the architect had acted beyond his powers or was guilty of fraud or bad faith in making his decision.³

This conclusion represents no departure from prior case law in Massachusetts and is consistent with the law elsewhere.⁴ The case is of interest, however, from the viewpoint of contract draftsmanship, particularly since the arbitration clause specifically provided that the arbitrators should, at the request of either party, refer "any question of law to the proper court," and in the event of any discrepancy between the arbitration clause and any other provisions of the contract the arbitration clause should govern. Since the arbitration machinery was ineffective in this instance to provide a review of the architect's

§4.2. ¹ 338 Mass. 746, 157 N.E.2d 521 (1959).

² 338 Mass. at 748, 157 N.E.2d at 523.

³ An additional possibility that the architect may have made a decision so completely erroneous as to have in effect substituted a new contract for that made by the parties was not considered by the Court or the arbitrators. See *Benjamin Foster Co. v. Commonwealth*, 318 Mass. 190, 61 N.E.2d 147 (1945); *Morgan v. Town of Burlington*, 316 Mass. 413, 55 N.E.2d 758 (1944).

⁴ *Hurley v. City of Boston*, 244 Mass. 466, 138 N.E. 838 (1923); *Shine v. Hagemeister Realty Co.*, 169 Wis. 343, 172 N.W. 750 (1919). See Spencer, *Powers of Direction and Determination Under Construction Contracts*, 41 Va. L. Rev. 343 (1955).

determination, if such a review is desired by the contracting parties, then the contract should so provide by more specific terms, preferably by appropriate language in the clause setting out the architect's powers.⁵ Any provision for such a right of review, however, would be contrary to the general philosophy of these stipulations which are designed to provide a speedy and inexpensive resolution of disputes connected with the job.⁶

In *Fred C. McLean Heating Supplies, Inc. v. Jefferson Construction Co.*,⁷ the principal question presented was whether an architect was empowered to settle a dispute between the prime contractor and a subcontractor, which dispute was not presented to the architect until after the project had been accepted by the Commonwealth of Massachusetts. The contract clause provided that the architect should decide all questions as to the interpretation of the plans and specifications and as to the fulfillment of the contract on the part of the contractor. His decision was to be final. This clause was incorporated by reference into the subcontract. The subcontractor installed the heating system as required but made no arrangements for its operation. The contractor then operated it for some five months and billed the subcontractor for the fuel consumed as well as for the labor required for its operation. Some two months after the building was accepted, the architect in a letter to the contractor interpreted the specifications to require the subcontractor to provide the heating. The master to whom the case was referred found the architect acted in good faith in making his determination, and his report was adverse to the subcontractor. The trial court sustained exceptions to the master's report, and this was affirmed on appeal.

The reasoning of the Supreme Judicial Court was that the purpose of the clause giving the architect the power to resolve disputes arising in connection with the drawings and specifications is to permit the continuance of the work with a minimum of interruption. This is evident from the language of previous cases that makes reference to the architect's exercise of control over the work "as it progresses."⁸ Therefore, this power is not to be construed as extending beyond the completion of the work, except in limited instances specified by appropriate language in the stipulation.⁹

This conclusion is undoubtedly correct as far as it goes, but it is doubtful if this is the only purpose in the minds of the parties when they insert such a stipulation in their contract. When a contractor

⁵ 3 Corbin, Contracts §652 (1951); Parker and Adams, The A.I.A. Standard Contract Forms and the Law 55, art. 39 (1954).

⁶ Annotation, 137 A.L.R. 530 (1942).

⁷ 1959 Mass. Adv. Sh. 961, 159 N.E.2d 95.

⁸ *Benjamin Foster Co. v. Commonwealth*, 318 Mass. 190, 61 N.E.2d 147 (1945). In *Handy v. Bliss*, 204 Mass. 513, 520, 90 N.E. 864, 865 (1910), the expression used is "in the exercise of the work." See also *Derby Desk Co. v. Connors Bros. Construction Co.*, 204 Mass. 461, 467, 468, 90 N.E. 543, 544 (1910).

⁹ These provisions deal principally with repairs or replacements required to be made for a period of a year after project acceptance.

agrees to be bound by a decision of an architect from which there is no right of appeal, irrespective of its soundness, absent abuse of power or fraud, is he not in fact indicating a willingness to pay the price of an honest but erroneous and costly architect's decision in order to avoid the necessity of having all job disputes resolved by the more costly and less expeditious method of court action?¹⁰ While presumably either the contractor or the subcontractor in the present case could have submitted the question to the architect in sufficient time to have the issue resolved prior to the acceptance of the project, it is not inconceivable that under other circumstances the disputant could withhold from the other party notification of the issue to be resolved, informally sound out the architect to get his reaction to the problem, and in the event that it appeared adverse to his contention, postpone the raising of the issue until a date that would preclude decision by the architect prior to acceptance of the project. The opinion leaves open the question of the effect of the project acceptance upon the power of the architect to resolve pending disputes. Whether appropriate contract language could eliminate the problem of post-acceptance submissions, as well as of those unresolved at acceptance, is undecided, although the general sense of the opinion would appear to permit such a possibility.

§4.3. Unilateral contracts: Broker's commission. One of the more troublesome problems in the law of contracts is concerned with the rights and obligations of parties to a contract transaction that is unilateral in nature, prior to the completion of the desired performance. The issue is most frequently raised when the offeror seeks to withdraw after the offeree has commenced but not completed the requested act. The Restatement of Contracts in this case would hold the offeror bound upon tender of part of the requested consideration, and even prior thereto upon the offeree's undertaking preparation or performance under circumstances in which fairness would require enforcement of the promise.¹ The problem is frequently posed in brokerage situations with their overtones of agency law.

In *Malloy v. Coldwater Seafood Corp.*,² the broker was employed under a contract terminable by the principal without notice. It was provided that a 5 per cent commission would be payable on direct sales of the principal's products in the New England area. At the time the major product sold was trade-marked fish fillets. Shortly after the contract was entered into, the industry became interested in

¹⁰ Parker and Adams, *The A.I.A. Standard Contract Forms and the Law* 57, art. 39 (1954).

§4.3. 1 Section 45 of the Restatement of Contracts states that when an offer for a unilateral contract is made and part of the performance tendered, the offeror is contractually bound during a reasonable time within which the offeree may complete his performance. Section 90 states that a promise reasonably expected to, and which does, induce action of a substantial character is binding when injustice would otherwise result. See 1 Corbin, *Contracts* §63 (1951); 1 Williston, *Contracts* §60A (3d ed. 1957).

² 338 Mass. 554, 156 N.E.2d 61 (1959).

the possible use of blocks of codfish for processing into frozen fish sticks. The broker actively solicited large industrial fish processors for some ten months, and made a few sample sales. The broker's activities and progress were periodically reported to the principal. After having secured a 40,000-pound order, for which the commission was paid, and while in the process of closing orders for some additional 270,000 pounds, the parties made a contract which excluded commissions on industrial sales to the five largest processors with whom the broker had been negotiating and from whom substantial orders were subsequently received. In addition the commission rate on all other industrial sales in amounts over 100,000 pounds was reduced. Three months later the principal terminated the contract as so modified. The broker sought to recover commissions on all sales made up to the time of termination and on sales that occurred after his discharge but largely as a result of his efforts. The evidence clearly showed that when the contract was modified the principal realized that the industrial demand for its products was so great that the services of a broker were unnecessary. It could also be inferred that the principal desired to avoid paying commissions on business it could obtain anyway without the services of a broker.

The trial judge instructed the jury that if the principal's motive in the cancellation of the contract was to deprive the broker of commissions he would otherwise have received, this would be evidence of bad faith, and the principal would, consequently, be liable for the commissions even though the broker might not have been the efficient cause of the sales. Conversely the rule was stated to be, that if the principal

acted in good faith, not seeking to escape the payment of commissions but motivated fairly by a view of its own interests, it had the absolute right before a bargain was made and while negotiations remained unsuccessful, before commissions were earned, to revoke the plaintiff's authority and the plaintiff cannot thereafter claim compensation for a sale made by the defendant even though it be to a customer with whom the plaintiff unsuccessfully negotiated and even though to some extent the defendant might justly be said to have availed itself of the fruits of the plaintiff's labor.³

This instruction was approved by the Supreme Judicial Court as a proper statement of applicable law in the light of an imposing list of Massachusetts decisions.

The effect of this rule is to penalize the broker when the revocation is made in good faith. That this rule happens to work well in a situation such as the present case does not eliminate its weaknesses. A principal could revoke in good faith in a case in which the broker has expended considerable time and money in either preparing for performance or in partially performing. Under the Massachusetts

³ 338 Mass. at 563, 156 N.E.2d at 66-67.

rule the broker would be remediless, despite the fact that the principal-offeror might ultimately if not immediately be the beneficiary of his very substantial and valuable activity. To permit the principal to be free of any obligation to make payment, at least to the extent of benefits received, merely because his heart was pure when he revoked the offer by termination of the relationship, brings about a result neither technically nor equitably satisfactory. The offeree's position is particularly unenviable because of the demonstrated reluctance of the Massachusetts courts to grant quasi-contractual relief for expenditures incurred in preparation for performance of a contract made impossible of fulfillment for reasons other than the fault of the opposite party.⁴

Though less striking in its inequity, the rule does bring about the result that a broker whose contract has been canceled in bad faith by his principal may recover full commissions on sales on which he has done work, although his work was concededly not the efficient cause of the sales. While presumably his contribution would have to have been substantial, it is not at all impossible that he would receive a windfall justifiable only as a penalty exacted from the principal who has attempted, by his cancellation, to avoid paying the broker any commissions at all.

This entire problem should be thoroughly reconsidered by the Court. Other jurisdictions have held that, when the broker has been given an exclusive agency and has in a bona fide manner entered upon performance and expended time and money thereon, the offer to pay commissions for sales secured becomes irrevocable for a reasonable time within which the broker may attempt to close the transactions.⁵ This appears to be a much more logical approach to the problem and one assuring a result not only more equitable but more in consonance with the actual intention of the parties when they enter into such a broker-principal relationship.

⁴ See the discussion of this point in §4.1 *supra*.

⁵ For a compilation of cases, see 1 Williston, Contracts §60A, n.6 (3d ed. 1957). See also 1 Corbin, Contracts §50 (1951).